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No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

THOMAS D. DAVIS, Petitioner,

v.

BRYANT MUELLAR, Sheriff of Rolette County, North Dakota, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the arrest of an Indian within his tribe's reservation by State officers who knowingly violate the tribe's extradition law contravene federal laws protecting tribal self-government?

2. Does a federal district court have habeas corpus jurisdiction to review an Indian's claim of illegal State arrest in Indian country prior to State court trial?

   a. Does exhaustion of State pre-trial remedies comply with the exhaustion requirement of 28 U.S.C. § 2254?

   b. Is exhaustion required in the special circumstances of this case?

3. When a State has obtained custody of an Indian by an illegal arrest in Indian country, and his tribe objects to the arrest, may a federal district court release him on habeas corpus until the State complies with the tribe's extradition law?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Thomas D. Davis respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 6, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 643 F.2d 521 (8th Cir. 1981). The opinion of the District Court is reported at 481 F.Supp. 888 (D.N.D. 1979). Both are reproduced in the appendix below.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1981. A timely petition for rehearing was denied on April 3, 1981, and this petition for

certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 2241

. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless -

. . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

. . .

28 U.S.C. § 2254

. . .

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State correc-

tive process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

. . .

Turtle Mountain Tribal Code § 1.0710

Extradition.

Any Indian found within the boundaries of the Turtle Mountain Indian Reservation who is wanted by State authorities for a violation of State law committed outside the jurisdiction of the Turtle Mountain Tribal Court, and a warrant of arrest having been issued from a State Court, may be arrested and taken into custody by Bureau of Indian Affairs or Tribal law enforcement personnel for prompt transfer to the appropriate enforcement agency. The arrest and removal of the fugitive will be accomplished in accordance with the procedure set forth herein: Copies of State warrants may be presented to the Agency Branch of Law and Order whereupon they will be recorded as to date and time received. The warrant will be promptly presented to the Tribal or Trial Court Judge of the Turtle Moun-

tain Tribal Court for a review as to date, charge, and person named thereon, to determine its apparent validity. The Judge, after satisfying himself or herself as to the apparent validity of the warrant, will issue an order for the arrest of the alleged fugitive from justice.

All Indians being taken into custody as provided in the preceding paragraph shall be taken by the police officer to the Turtle Mountain Tribal Court where the Judge shall hold a hearing to determine only whether the Indian person in custody and before the Court is the same person charged on the face of the warrant. An Indian may waive such hearing by executing a waiver of removal hearing and he will be promptly turned over to the custody of the appropriate State official. Where a State warrant is issued from a State other than the State wherein the Indian Court is located, the warrant should be presented to the Tribal Court by the Sheriff of the County in which the reservation is located. Upon assurance by the local sheriff that the

out-of-state agency will extradite the wanted subject, the procedure governing the arrest of the wanted fugitive may be completed as in other cases. After a hearing, as provided in paragraph (2) above, if the Judge is satisfied the fugitive is the same person named in the State warrant, the Judge shall issue an appropriate order to that effect which will authorize the State official to remove the fugitive from the Turtle Mountain Indian Reservation. In all cases wherein Indians are arrested by reservation law and order personnel the requesting agency supplying the warrant shall be immediately notifed that the subject is in custody and will be delivered to a proper official within a reasonable time to transfer the fugitive to their particular jurisdiction.

STATEMENT OF THE CASE

Petitioner Davis seeks release by habeas corpus from custody of respondent Sheriff of Rolette County, North Dakota, until the sheriff complies with the extradition law of the Turtle Mountain Band of Chippewa Indians. Federal laws protecting tribal self-government and the federal habeas corpus statutes are the bases for petitioner's claim of federal jurisdiction.

Petitioner is an enrolled member of the Turtle Mountain Band of Chippewa Indians, a federally-recognized tribe organized under a tribal constitution and laws approved by the Secretary of the Interior.

The tribe's home is the Turtle Mountain Indian Reservation in Rolette County, North Dakota. [1]

On October 9, 1978, Davis allegedly made a threatening telephone call to Kim Albert concerning an incident in which Albert had struck Davis's wife. Albert received the call in Rolla, outside the Turtle Mountain Reservation. A. p. A5 n.2. The next day Davis was arrested without a warrant by a Rolette County Deputy Sheriff and charged with terrorizing under North Dakota law. N.Dak. Cent. C. § 12.1-17-04. The arrest occurred within the Turtle Mountain Reservation, Davis requested an extradition hearing under tribal law, and he refused to waive

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1/ The Reservation is set aside under Executive Orders, agreement, and federal statute. See C. Kappler, Indian Affairs: Laws and Treaties vol. 1, p. 885, vol. 3, p. 39 (GPO).

extradition. Rolette County officers nevertheless took Davis into custody "even though they were aware of the requirements of the extradition ordinance." A. p. A6. 2/

Davis was held until later that day, when his wife posted bond at the Rolette County Sheriff's Office in Rolla. The terms of his bond require him to appear in the State courts.

In four separate appearances, Davis made his claim of unlawful arrest in violation of tribal extradition law to the North Dakota courts. The North Dakota Supreme Court denied a writ of prohibition, "noting that prohibition is granted only sparingly and only where there is no

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2/ The Turtle Mountain extradition law is quoted above at page 3. It was approved by the Interior Department in 1967. The law provides for arrest by tribal or federal officers after State officials present an arrest warrant and a judicial hearing as conditions precedent to State custody. Turtle Mountain Code § 1.0710.

adequate remedy by appeal" and "[w]ithout reaching the lawfulness of the arrest." A. pp. A8-A9, citing Davis v. O'Keefe, 283 N.W.2d 73, 76 (N.D. 1979). The present federal action was then filed. The District Court denied the petition on December 27, 1979. A. pp. A55-A68. The Eighth Circuit affirmed on March 6, 1981, Judge McMillian dissenting. A. pp. A1-A54. The Turtle Mountain Band appeared as amicus curiae in support of petitioner. A. p. A14. The court held that there was no federal court jurisdiction prior to State court trial, or in the alternative, habeas corpus relief is unavailable to an Indian in State custody under an unlawful arrest. 3/

3/ The courts below have stayed the State court prosecution pending final resolution of this action. See 28 U.S.C. § 2251. The stay now in effect was issued by the Court of Appeals on April 17, 1981. It expires upon final action by this Court.

REASONS FOR GRANTING THE WRIT

A. The Arrest Was Illegal.

The court below correctly assumed that Davis's seizure was illegal under federal laws protecting tribal self-government. A. pp. A14-A17. See A45-A53 (dissenting opinion). States must comply with tribal extradition laws when seeking the arrest of Indians in Indian country. Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003; Benally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976). These holdings are consistent with this Court's decisions protecting tribal self-government. See Fisher v. District Court, 424 U.S. 382 (1976); Kennerly v. District Court, 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959); United States v. Kagama, 118 U.S. 375 (1886).

B. The Decision Below Conflicts With Prior Decisions of this Court, of Other Courts of Appeals, and of the Supreme Court of New Mexico.

1. Jurisdiction. The court below held that there is no federal court jurisdiction to review the illegality of an Indian's seizure in Indian country prior to State court trial. This holding is directly contrary to the decision in Arizona ex rel. Merrill v. Turtle, supra. In Turtle, Oklahoma had sought extradition of an Indian residing within the Navajo Indian Reservation in Arizona. An Arizona sheriff arrested Turtle in violation of the Navajo extradition law. The Ninth Circuit sustained the district court's grant of release on habeas corpus based on interference with tribal self-government, holding that control of extradition is "essential to the Navajos' self-government." 413 F.2d at 685-86.

The majority opinion below attempted to distinguish Turtle because there the demanding State had not yet obtained custody. A. pp. A16-A17. The opinion also said that the issue must be postponed until Davis's state trial has been completed. A. pp. A9-A18. Neither point makes sense. Testing the validity of an arrest after trial is either futile, because "A conviction is rarely overturned on the ground of unlawfulness of the arrest", A. p. A12 n. 7, or wasteful, because the expense and time of a trial have already been sustained and jeopardy has attached. See part B2 infra. As the dissent noted, the purpose of an extradition law "to permit limited inquiries by the asylum jurisdiction . . . prior to releasing custody of the fugitive" would be defeated if tribal extradition laws were considered after State trial.

"The tribal extradition process would be meaningless, and the Turtle Mountain Band would have no adequate remedy." A. pp. A26-A28 (dissenting opinion). If there is federal jurisdiction to release Davis at any time based on his illegal arrest, the most efficient time for everyone - including the State - is prior to trial.

In Benally v. Marcum, supra, the New Mexico Supreme Court ordered the release on habeas corpus of an Indian arrested within the Navajo Reservation by State officers. The court sustained release based on interference with tribal self-government until the State officers complied with the Navajo extradition law. While federal court jurisdiction was not at issue, the court recognized the sense of determining this issue prior to trial.

Insofar as the decision below rests on the exhaustion requirement of 28 U.S.C.

§ 2254, it also conflicts with this Court's holding in Frisbie v. Collins, 342 U.S. 519 (1952) (discussed further under B.2 infra). There the Court held that illegal arrest and removal to a prosecuting jurisdiction constituted "special circumstances" justifying federal court review without exhaustion of State court remedies. Both in Frisbie and in Turtle, supra, no submission had been made to the State courts. By contrast petitioner Davis has fully exhausted State pre-trial remedies. A. pp. A7-A9. [4]

Hence, the conclusion of the court below that it lacked jurisdiction prior to State trial conflicts with this Court's

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4/ The Court below also relied on this Court's decision in Younger v. Harris, 401 U.S. 37 (1971). This reliance was misplaced. Younger was based on the constitutional responsibility of State courts in cases wholly within State territorial authority. By contrast, Indian country is a place under special federal authority and protection.

holding in Frisbie and with the other cases cited.

2. Remedy. The court below held that even if it had subject matter jurisdiction and the arrest was illegal, it could not order Davis's release because the North Dakota sheriff could maintain custody over a defendant seized unlawfully under the rule of Frisbie v. Collins, Supra. A. pp. A18-A22. In Frisbie, after sustaining federal court jurisdiction, the Court held that defendant's allegation that he had been illegally arrested in Illinois and brought to Michigan was not a basis for habeas corpus release.

The reliance on Frisbie by the court below is contrary to the holding of the New Mexico Supreme Court in Benally v. Marcum, supra. That Court held that Frisbie should not be applied to violation of a tribal extradition law by State

officers and that defendant's right to due process of law would be violated by trial based on illegal seizure and removal from the reservation. See also the dissenting opinion in the court below. A. pp. A29-A54.

Reliance on Frisbie is also in conflict with the Second Circuit's rule that Frisbie does not apply when the asylum jurisdiction objects to the seizure. United States v. Toscanino, 500 F.2d 267, 270 (2d Cir. 1974). See United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67-68 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (Toscanino distinguished on this ground); United States v. Lira, 515 F.2d 68, 71-72 (2d Cir. 1975) cert. denied. 423 U.S. 847 (same); dissenting opinion below, A. pp. A53-A54. As previously noted, the Turtle Mountain Band has objected to Davis's seizure.

Frisbie and decisions following it mostly are post-trial attempts to overturn a conviction, after jeopardy has attached and both parties have sustained the full expense of a trial. This again demonstrates that the sensible time to determine this issue is prior to trial. After trial the tribe's interest in the integrity of its processes will be thwarted by an acquittal or prejudiced by the reliance interest of the State in sustaining its conviction.

Furthermore, Frisbie has been severly criticized as inconsistent with modern concepts of due process of law. [5] It should not be extended to preclude meaningful protection of tribal self-government. Therefore, application of the

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5/ See Government of Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n. 2 (3d Cir. 1970) and authorities cited. See also United States v. Toscanino, supra; Benally v. Marcum, supra.

Frisbie rule by the court below conflicts with decisions of the Second Circuit and of the Supreme Court of New Mexico.

C. The Decision Below Raises Important and Recurring Problems of Tribal and State Jurisdiction Not Yet Addressed by This Court.

Many Indian tribes have adopted extradition laws that have been approved by the United States Department of Interior. Tribal extradition laws are derived from the sovereignty of Indian tribes "over both their members and their territory". United States v. Mazurie, 419 U.S. 544, 557 (1975).

The decision below raises serious questions about tribal authority to adopt and enforce extradition laws. The decision would apparently permit state officials completely to ignore tribal extradition laws and to arrest and take into custody an Indian at any time and place on the

reservation (including tribal offices). Also, when a protest by the Indian tribe involved on behalf of its tribal member (as in this case) does not effect the release of the tribal member or compliance with the extradition law, tribal extradition laws are rendered meaningless and useless.

The lawless State conduct here threatens and has a direct effect on the political integrity of the tribe. See Montana v. United States, ____ U.S. _____ (No. 79-1128, March 24, 1981) (slip op. at 20). As successful law enforcement on the reservation requires close cooperation among all law enforcement agencies, this Court should review the decision below to protect tribal government and promote harmony in reservation law enforcement.

CONCLUSION

For the reasons stated, the Court is respectfully requested to grant a writ of certiorari to review the decision below.

Respectfully submitted,

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APPENDIX

Opinions Below

Thomas D. DAVIS, Appellant,

v.

Bryant MUELLAR, as Sheriff of Rolette County, North Dakota, Appellee.

No. 80-1082.

United States Court of Appeals, Eighth Circuit.

Submitted March 14, 1980.

Decided March 6, 1981

Before HENLEY and McMILLIAN, Circuit Judges, and HARPER,* Senior District Judge.

HENLEY, Circuit Judge

Thomas D. Davis appeals the district court order, 481 F.Supp. 888, denying his petition for a pretrial writ of habeas corpus, 28 U.S.C. § 2241(c)(3), by which he sought release from North Dakota state

* The Honorable Roy W. Harper, United States Senior District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

custody on grounds that his arrest and state custody were, and are, in violation of a tribal extradition ordinance. We affirm.

Davis is an enrolled member of the Turtle Mountain Band of Chippewa Indians. The tribal extradition ordinance, first approved by the United States Bureau of Indian Affairs on June 13, 1967, mandates the following procedure in arresting a tribal member for a crime committed off the reservation: the state officials present the arrest warrant to tribal officials, the tribal officials make the arrest, and the Indian accused has an extradition hearing as a prerequisite to state custody. Turtle Mountain Tribal Code § 1.0710. [1]

1/ Turtle Mountain Tribal Code (1976) provides in part:

> 1.0710. Extradition. Any Indian found within the boundaries of the Turtle Mountain Indian Reservation who is wanted by State authorities

(Footnote continued on next page).

The Turtle Mountain Indian Reservation is composed of two townships in Rolette County, North Dakota. Indian land, in the County, but outside the reservation, makes

(Footnote 1 continued) for a violation of State law committed outside the jurisdiction of the Turtle Mountain Tribal Court, and a warrant of arrest having been issued from a State Court, may be arrested and taken into custody by Bureau of Indian Affairs or Tribal law enforcement personnel for prompt transfer to the appropriate enforcement agency. The arrest and removal of the fugitive will be accomplished in accordance with the procedure set forth herein; Copies of State warrants may be presented to the Agency Branch of Law and Order whereupon they will be recorded as to date and time received. The warrant will be promptly presented to the Tribal or Trial Court Judge of the Turtle Mountain Tribal Court for a review as to date, charge, and person named thereon, to determine its apparent validity. The Judge, after satisfying himself or herself as to the apparent validity of the warrant, will issue an order for the arrest of the alleged fugitive from justice.

All Indians being taken into custody as provided in the preceding paragraph shall be taken by the police officer to the Turtle Mountain Tribal

(Footnote continued on next page).

up another two townships. The resulting patchwork of Indian and state jurisdiction requires close cooperation between Indian and state officials, and there is no reason to believe that in general such

(Footnote 1 continued) Court where the Judge shall hold a hearing to determine only whether the Indian person in custody and before the Court is the same person charged on the face of the warrant. An Indian may waive such hearing by executing a waiver of removal hearing and he will be promptly turned over to the custody of the appropriate State official. Where a State warrant is issued from a State other than the State wherein the Indian Court is located, the warrant should be presented to the Tribal Court by the Sheriff of the County in which the reservation is located. Upon assurance by the local sheriff that the out-of-state agency will extradite the wanted subject, the procedure governing the arrest of the wanted fugitive may be completed as in other cases. After a hearing, as provided in paragraph (2) above, if the Judge is satisfied the fugitive is the same person named in the State warrant, the Judge shall issue an appropriate order to that effect which will authorize the State official to remove the fugitive from the Turtle Mountain Indian Reservation. In all

(Footnote continued on next page).

cooperation does not exist. Specifically, with respect to the arrest of Davis subjective bad faith is denied.

On the night of October 9, 1978 Davis allegedly made a telephone call from the Reservation in which he threatened to kill one Kim Albert the next day at the Town of Rolla. [2] The alleged threat was reported to Rolette County officials who determined to arrest Davis the following morning.

On the morning of October 10, 1978 the

(Footnote 1 continued) cases wherein Indians are arrested by reservation law and order personnel the requesting agency supplying the warrant shall be immediately notified that the subject is in custody and will be delivered to a proper official within a reasonable time to transfer the fugitive to their particular jurisdiction.

2/ Davis was subsequently charged with terrorizing, a Class C felony under N.D. Cent.Code § 12.1-17-04, for allegedly making the threatening phone call to Kim Albert concerning an incident in which Albert struck Davis's wife. Albert received the call in Rolla, an off-reservation town, on October 9, 1978.

tribal police department, obviously acting in cooperation with the Rolette County sheriff's office, notifed Davis at his place of employment on the reservation that the county officers wished to speak with him and asked him to come to the Tribal Law and Order Office, which he did. After a short time a deputy sheriff arrived and Davis was arrested without a warrant. The record reflects that Davis refused to waive extradition and requested a hearing. However, no tribal judge was available nor was one to be available that day. In those circumstances Rolette County officials elected to take Davis into custody even though they were aware of the requirements of the extradition ordinance.

After Davis was placed in state custody, a complaint was filed, a warrant was issued, and bond was set at $1,500.00. Later that afternoon, Davis's wife posted

bond at the Rolette County sheriff's office in Rolla. Davis was released, but the terms of his bond required him to appear in the state courts. [3]

Davis presented his unlawful arrest claims to North Dakota state courts in four separate appearances. At his preliminary hearing in county justice court, Davis moved for a dismissal on the basis that the state arrest and custody of him on the reservation violated his rights under the tribal extradition ordinance and frustrated the federal guarantee of tribal self-government. This motion was denied, and he was bound over to the state district court. Then, Davis petitioned the state district court for a writ of habeas corpus,

---

3/ Davis did not waive lack of jurisdiction by posting bond and making special appearances before the courts. Albrecht v. United States, 273 U.S. 1, 9, 47 S.Ct. 250, 253, 71 L.Ed. 505 (1926). Indeed, habeas corpus relief would include return of the posted bond.

releasing him from state custody until the tribal extradition ordinance had been complied with. The writ was denied on the ground that he was not "in custody." [4] At the time of his arraignment in state district court, Davis again moved to dismiss on the basis of violation of tribal extradition laws but was denied relief. Finally Davis sought a writ of prohibition from the Supreme Court of North Dakota to restrain the impending district court prosecution. Without reaching the issue of the lawfulness of the arrest, the state supreme court denied the writ, noting that prohibition is granted only sparingly and

4/ For federal purposes, Davis is "in custody." Kolski v. Watkins, 544 F.2d 762, 763 n.2 (5th Cir. 1977); United States ex rel. Scranton v. New York, 532 F.2d 292, 293-94 (2d Cir. 1976). North Dakota apparently requires allegation of confinement in a petition for state habeas corpus. See Fournier v. Roed, 161 N.W.2d 458, 470 (N.D. 1968) (Knudson, J., concurring specially).

only where there is no adequate remedy by appeal. Davis v. O'Keefe, 283 N.W.2d 73, 76 (N.D. 1979).

Davis then took his claim to federal court. He petitioned the United States District Court for the District of North Dakota for a writ of habeas corpus based on the tribal extradition ordinance. By an order dated December 27, 1979, the district court denied the petition on the ground that Davis had not exhausted state remedies because he had not yet been tried and convicted and that there were no special circumstances to override the exhaustion requirement. An administrative panel of this court granted a certificate of probable cause and directed that the state criminal proceeding be stayed pending appeal.

I. Federal Judicial Intervention.

At the outset we are confronted with

the question whether this court should assume jurisdiction and decide this case on its merits.

Davis contends that the special circumstances of this case negate the need for exhaustion of state remedies. Alternatively, he contends that state remedies have been exhausted. He asserts that the unique status given tribal sovereignty constitutes a special circumstance. [5]

Public policy and 28 U.S.C. § 2283 [6]

5/ Davis also argues that state officials' knowing and willful violation of tribal ordinances constituted special circumstances. However, the district court found that there was no showing of bad faith or harassment. We see no need to overturn that finding.

6/ 28 U.S.C. § 2283. Stay of State Court Proceedings

> A court of the United States may not grant an injunction to stay the proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

discourage federal court interference with state court proceedings. Younger v. Harris, 401 U.S. 37, 40-41, 91 S.Ct. 746, 748-749, 27 L.Ed.2d 669 (1971). Younger, which dealt with a federal stay or injunction of a pending state criminal prosecution, was based on "the notion of 'comity,' that is, a proper respect for state functions." Id. at 43-44, 91 S.Ct. at 750. The same policy has been applied to federal habeas corpus relief from a state criminal trial. E.g., Kolski v. Watkins, 544 F.2d 762, 766 (5th Cir. 1977); United States ex rel. Scranton v. New York, 532 F.2d 292, 295 (2d Cir. 1976); United States ex rel. Tyler v. Hall, 444 F.Supp. 104, 106 (E.D. Mo. 1978). However, the rule of comity does not limit the power of the federal courts to dispense with the exhaustion requirement altogether where "special circumstances" exist. E.g., Braden v. Thirtieth

Judicial Circuit Court, 410 U.S. 484, 489, 93 S.Ct. 1123, 1126-1127, 35 L.Ed.2d 443 (1973) (speedy trial rights); Ex parte Royall, 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed. 868 (1886); United States ex rel. Russo v. Superior Court, 483 F.2d 7, 12 (3d Cir.), cert. denied, 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 313 (1973) (double jeopardy).

The federal district court held that requiring Davis to defend hemself in a criminal trial would not justify habeas corpus relief under the "both great and immediate" irreparable injury test of Younger. As the district court noted, while Davis has exhausted his pretrial state remedies he could appeal a state conviction on the ground of the unlawfulness of the arrest. [7] And as Younger teaches,

7/ A conviction is rarely overturned on the ground of unlawfulness of the arrest
(Footnote continued on next page).

the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution. Younger v. Harris, 401 U.S. at 46, 91 S.Ct. at 751.

As stated, it is urged here that serious questions of tribal sovereignty and state-tribal relations are raised to such an extent as to constitute special circumstances justifying dispensing with

(Footnote 7 continued) so long as fruits of the illegal arrest are not used at trial. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). Even where the illegal extradition does not invalidate a subsequent conviction, the defendant may have a cuase of action under 42 U.S.C. § 1983. See Brown v. Nutsch, 619 F.2d 758 (8th Cir. 1980), and cases cited therein.

exhaustion requirements as contemplated by Braden and Russo.

The Turtle Mountain Band of Chippewa Indians has appeared amicus curiae and has undertaken to raise questions as to the extent to which the state must recognize sovereignty and control of the tribal government over the reservation's inhabitants. Thus, it may be said that in a sense we are to be concerned not only with the personal injury to Davis but with broader tribal interests as well.

Tribal sovereignty undoubtedly includes the power to establish a court system. American Indian Policy Review Commission, 95th Cong., 1st Sess., Final Report (Comm. Print 1977), at 99 (hereinafter Final Report), and the trust responsibility of the federal government includes protecting

tribal sovereignty. Id. at 104.[8] Indeed, the federal courts historically have protected tribal sovereignty from state interference. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561, 8 L.Ed. 483 (1832). Moreover, consideration of comity underlying Younger to a degree may be said to apply to tribal governments as well.[9] And if we were presented with a

8/ A refusal of state police officers to recognize legitimate tribal judicial authority while on the reservation is at least to some extent state interference with tribal sovereignty. E.g., Fisher v. District Court, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975).

9/ Davis suggests that the principle of comity itself mandates respect for tribal law, as the law of a third independent

(Footnote continued on next page).

claim filed to protect the extradition process prior to surrender of the individual petitioner to the demanding state considerations of comity and concern for tribal sovereignty might well dictate exercise of federal jurisdiction.

Such a pre-surrender case decided before Younger was Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970). In Merrill after the Navajo Tribal Court declined to extradite a reservation Indian to Oklahoma, Arizona honored an extradition demand by Oklahoma and arrested the Indian on the

(Footnote 9 continued) sovereign, citing United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). While it is clear that tribal reservation sovereignty is not congruent with state sovereignty, such sovereignty as the tribes do possess is entitled to recognition and respect both by state and federal governments.

reservation. The habeas corpus petition was brought in the asylum jurisdiction (Arizona) to prevent the demand jurisdiction (Oklahoma) from taking custody of him. The federal court entertained the petition and it was granted on the ground that Arizona had no extradition jurisdiction over Indian residents of the Navajo Reservation which would justify an arrest on the Reservation upon a demand from Oklahoma.

But Merrill is not the case before us. Here, Davis is in custody of North Dakota. There is a pending state criminal prosecution in which Davis's rights may be recognized and we are convinced that neither the asserted tribal interest, Davis's individual interest, nor any combination of the two justifies our exercise of habeas jurisdiction.

From what has been said, it is clear that the judgment of the district court

should be affirmed and this opinion brought to a close. Even so, the position taken by the dissent seems to call for a statement on the merits and we undertake a brief discussion of the personal jurisdiction issue despite some misgiving brought on by Firestone Tire & Rubber Co. v. Risjord, ____ U.S. _____, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), in which the Supreme Court held that this court in In re Multi-Piece Rim Products Liability, 612 F.2d 377 (8th Cir. 1980), having decided it had no jurisdiction of an interlocutory appeal erred in ruling prospectively on the merits of the appeal.

II. Personal Jurisdiction.

The traditional rule is that a state court maintains personal jurisdiction over a defendant brought before the court by unlawful means. Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 112, 96 L.Ed. 651 (1952).

This has been the law at least since the 1880's when an officer from Kentucky arrested in West Virginia and abducted therefrom one Mahon who was a fugitive from a murder charge in Kentucky, Mahon v. Justice, 127 U.S. 700, 8 S.Ct. 1204, 32 L.Ed. 283 (1888), and when an officer commissioned by the United States illegally abducted from Peru and brought to California a fugitive from a felony charge pending in Illinois, Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 80 L.Ed. 421 (1888).

Personal jurisdiction, once obtained, continues and illegality of arrest may not serve as grounds for attack on a subsequent conviction. Gerstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854, 865-866, 43 L.Ed.2d 54 (1975); Frisbie v. Collins, supra; Pruitt v. Hutto, 542 F.2d 458, 459 (8th Cir. 1976).

Only in United States v. Toscanino,

500 F.2d 267, 274-79 (2d Cir. 1974), has a court carved out an exception to the illegal arrest rule. In Toscanino the court remanded for an evidentiary hearing concerning the defendant's allegation that he was illegally kidnapped from Uruguay and transported to the United States in a manner which "shocked the conscience" of the court. That exception was expressly limited by the Second Circuit in United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), cert. denied, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975), to egregious incidents, as in Toscanino, which shock the conscience.

The facts of this case simply do not suggest the type of shocking conduct described in Toscanino, supra, 500 F.2d at 274-79, that would provide grounds for granting appellant's requested relief.

In a case involving an alleged illegal

arrest in Indian country and a claim that illegality of the arrest without extradition divested a state court of jurisdiction to try a habeas petitioner, this court recently followed the general rule and refused habeas relief. Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980).

As we understand the dissent, it does not quarrel with the general rule. Rather, it bases jurisdiction and its reasoning on the merits on the special status of Indian tribes in the United States and special governmental interest in Indian self-government. We do not disagree that there is a special and unique relationship between the government and the tribes nor do we question the power of the United States to alter the Ker-Frisbie personal jurisdiction rule. But we are unable to find that the United States has by policy, by treaty, by statute or by

court decision decreed North Dakota's loss of personal jurisdiction over appellant as a penalty for having arrested appellant in violation of the tribal extradition ordinance here involved.

We direct dissolution of the interlocutory stay heretofore entered by this court and affirm the judgment of the district court.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent. Because of federal protection of tribal sovereignty, I would reverse and grant a writ of habeas corpus [1] releasing Davis from state custody

1/ Davis petitioned for pre-trial writ of habeas corpus, 28 U.S.C. § 2241(c)(3), and subsequently moved for certificate of cause for appeal, 28 U.S.C. § 2253. The district court, however, treated this as a § 2254 petition on behalf of a person in custody pursuant to the judgment of a state court. See discussion of Weddell v. Meierhenry, infra, p. 530.

until Rolette County officials comply with the Turtle Mountain tribal extradition ordinance.

I. Federal Jurisdiction

As the majority noted, the injury to Davis personally is not the primary interest being asserted here. The issue is not whether an Indian can avoid state prosecution for crimes committed off the reservation, but whether the state must recognize some degree of sovereignty and control of the tribal government over the reservation's inhabitants. On that issue the district court stated, "Tribal sovereignty and state-tribal relations ... do not rise to the standard of special circumstances contemplated in Braden and Russo." Davis v. Muellar, 481 F.Supp. 888, 891 (D.N.D. 1979). I disagree.

Tribal sovereignty includes the power to establish a court system.

American Indian Policy Review Commission, 95th Cong., 1st Sess., Final Report 99 (Comm. Print 1977) (hereinafter Final Report). The trust responsibility of the federal government includes protecting tibal sovereignty. Id at 104. The refusal of state police officers to recognize legitimate tribal authority while on the reservation is a classic example of state interference with tribal sovereignty. E.g, Fisher v. District Court, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706 (1975). Because the tribes are often at a loss to remedy such state interference, the federal courts [2]

2/ Congress has also protected tribal self-government. Indian Reorganization Act, 25 U.S.C. §§ 476, 477; 18 U.S.C. §§ 1151, 1152; Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 et seq.; Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq.; and Indian Self-Determination Act, 25 U.S.C. § 450 et seq. See discussion infra, p. 531.

have historically protected tribal sovereignty from state interference. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561, 8 L.Ed. 483 (1832). The first federal court [3] that considered an Indian's habeas corpus petition [4] based on violation of the

3/ In Arizona ex rel. Merrill v. Turtle, after the Navajo Tribal Court declined to extradite a reservation Indian to Oklahoma, Arizona honored an extradition demand by Oklahoma and arrested the Indian on the reservation. The habeas corpus petition was brought in the asylum jurisdiction (Arizona) to prevent the demand jurisdiction (Oklahoma) from taking custody of him. Thus, there was no Ker-Frisbie problem. See discussion, infra, p. 529.

4/ Similarly, in Moe v. Confederated Salish and Kootenai Tribes, suit for declaratory and injunctive relief was brought shortly after the arrests and the district court granted the Indians relief without even considering Younger abstention. 392 (Footnote continued on next page).

tribal extradition law [5] did so before Younger. That court took jurisdiction and granted habeas corpus relief on the ground that control of the extradition process was essential to tribal sovereignty. Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970). Where tribal sovereignty is at stake, I believe that federal jurisdiction should still be available, under the special circumstances exception to Younger.

The primary purpose of an extradition

(Footnote 4 continued) F.Supp. 1297 (D. Mont. 1974); and 392 F.Supp. 1325 (D. Mont. 1975). See Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 468 n.5, 96 S.Ct. 1634, 1639 n.5, 48 L.Ed.2d 96 (1976).

5/ High Pine v. Montana, 439 F.2d 1093 (9th Cir. 1971), was a habeas corpus action by an Indian arrested on the reservation but there was no violation of the tribal ordinance because he was arrested by the tribal police and surrendered by the tribal authorities. Therefore, there was no state (Footnote continued on next page).

law is to permit limited inquiries by the asylum jurisdiction into the criminal process utilized by the demanding jurisdiction prior to releasing custody of the fugitive. Certainly a state, in the exercise of its own sovereign powers, claims an interest in the extradition of any fugitive who is present in its jurisdiction. But the district court in the present case would delay consideration of a violation of the tribal extradition law not only until after custody is surrendered but also until after the fugitive is tried and convicted. Such a delay would defeat the purpose of this essential function of the Turtle Mountain

(Footnote 5 continued) interference with tribal sovereignty. Furthermore, he had signed a waiver of right to extradition proceedings. Curtis v. Bennett, 351 F.2d 931 (8th Cir. 1965) (such waivers are valid).

This court recently reviewed Weddell v. Meierhenry. See discussion, infra p. 530.

Band's self-government. The tribal extradition process would be meaningless, and the Turtle Mountain Band would have no adequate remedy. Violation of tribal extradition laws is impermissible state interference with tribal sovereignty. This is not to say that reservations have identical sovereign status with the states, but rather that such degree of sovereignty as the tribes do possess must be recognized by the states and will be protected by the federal courts from state interference. Therefore, I believe that tribal sovereignty does rise to the standard of special circumstances which justify dispensing with the exhaustion requirement. [6]

6/ Alternatively, Davis contends that state remedies had been exhausted. Davis had presented his federal claims to the state courts in four proceedings, including one before the highest state court. In light of my conclusion that exhaustion of state remedies was not required, however, I would leave open the question of whether the exhaustion requirement would have been satisfied.

II. Personal Jurisdiction

Having decided that we are not precluded by Younger from hearing the appeal, I would turn to the substantive issue of whether the state court retains personal jurisdiction over Davis despite the state's violations of the tribal extradition code. This is a difficult issue because the state's interest in maintaining jurisdiction over one accused of a state crime is in direct conflict with the tribe's interest in self-government. I would hold that the state court does not have jurisdiction to try an Indian brought before it in violation of the tribal extradition ordinance.

The traditional rule is that the court maintains personal jurisdiction over a defendant brought before the court by unlawful means. Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 112, 96 L.Ed. 651 (1952); Ker v. Illinois, 119 U.S. 436, 7 S.Ct.

225, 30 L.Ed. 421 (1888). Ker involved extradition [7] (prisoner kidnapped from Peru "in total disregard of that treaty"; no violation of provisions of treaty), while Frisbie involved rendition [8] (prisoner abducted by force from Illinois and brought to Michigan for trial).

7/ Extradition between nations is based on the notion of comity. Extradition rights exist only when created by treaty; in the United States, by Act of Congress pursuant to U.S. Const. art. II, § 2. The Constitution makes extradition treaties a part of the Supreme Law of the Land, id. art. VI, § 2, and as such their construction is for the courts.

8/ Rendition between states, on the other hand, is founded on article IV, § 2 of the Constitution and effectuating federal statutes. It is not based on comity, nor is it governed by the same principles as extradition. Biddinger v. New York City Police Comm'r. 245 U.S. 128, 132-33, 38 S.Ct. 41, 42-43, 62 L.Ed. 193 (1917). Rendition being a federal matter, federal law preempts any conflicting state legislation. Cf. Ross v. Middlebrooks, 188 F.2d 308 (9th Cir.). cert. denied, 342 U.S. 862, 72 S.Ct. 90, 96 L.Ed. 649 (1951); Ex parte Arrington, 270 S.W.2d 39, 42 (Mo. banc 1954).

The Ker-Frisbie rule has two related components. First, a treaty of extradition creates rights only as to the sovereign; it does not confer a right of asylum on the fugitive. Ker v. Illinois, supra, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421; Siegel v. Edwards, 566 F.2d 958, 960 (5th Cir. 1978). Therefore, an objection by the asylum jurisdiction to the illegal arrest may affect the jurisdiction of the demanding jurisdiction. See Ker v. Illinois, supra, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421; United States v. Lira, 515 F.2d 68, 71-72 (2d Cir.), cert. denied, 423 U.S. 847, 96 S.Ct. 87, 46 L.Ed.2d 69 (1975); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67-68 (2d Cir.), cert. denied, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975). Second, the fourth amendment does not extend to extraterritorial actions or actions by foreign agents. Frisbie v.

Collins, supra, 342 U.S. 519, 72 S.Ct. 112, 96 L.Ed. 651; United States v. Busic, 592 F.2d 13, 23 (2d Cir. 1978). The Ker-Frisbie rule is inapplicable where the United States has by treaty imposed a territorial limitation on its own authority. Cook v. United States, 288 U.S. 102, 121-22, 53 S.Ct. 305, 312, 77 L.Ed. 641 (1933).

In United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), the Second Circuit created an exception to the Ker-Frisbie rule, but later limited the exception to "degrading, egregious, outrageous and flagrant indignities to human personality." United States v. Winter, 509 F.2d 975, 986 n. 36 (5th Cir. 1975). E.g., United States v. Lira, supra, 515 F.2d at 71-72 (abduction after torture by foreign official upheld); United States ex rel. Lujan v. Gengler, supra, 510 F.2d at 67-68 (abduction in absence of torture upheld).

In Bennally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976), on facts comparable to those at bar,[9] the Supreme Court of New Mexico held that violation of the tribal extradition ordinance barred state prosecution of an Indian. It did so on the basis of the Toscanino exception to the Ker-Frisbie rule.

9/ In Bennally v. Marcum, an enrolled member of the Navajo tribe committed traffic offenses in a nearby city. Although he was followed directly to the reservation and arrested, the fresh pursuit doctrine was inapplicable because the offenses were only misdemeanors, not felonies. The Supreme Court of New Mexico granted a writ of prohibition preventing the municipal court from proceeding in the case. Following Arizona ex rel. Merrill v. Turtle, the state Supreme Court stressed that the tribal extradition procedures had been codified and approved by the federal government. And, like the Ninth Circuit, it granted relief to the Indian accused prior to the state trial. However, Arizona ex rel. Merrill v. Turtle is inapposite to the Ker-Frisbie issue because there the challenge was to a proposed extradition, whereas here the demanding jurisdiction already has custody of the defendant.

In Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), a panel of this court tersely refused to extend the Toscanino exception to a habeas corpus petition by a reservation Indian. Weddell v. Meierhenry could be easily distinguished from the case at hand. For example, that arrest was by a BIA officer acting pursuant to arrest authority in Indian country, not by state officials; the arrest was after an armed siege, not at a voluntary meeting; and the habeas corpus petition was filed two and one-half years after conviction, not before trial. Most importantly, in Weddell v. Meierhenry, the tribe was not before the court and no tribal interests were asserted, whereas here the tribe filed as amicus and appeared before the court. Therefore, that case is consistent with my result. Furthermore, I agree with the majority that is is neither appropriate

nor necessary to extend Toscanino to the situation before us. Rather, my conclusion is grounded in the concept of federal preemption.

I begin my discussion of Indian law mindful of the following admonition from the American Indian Policy Review Commission:

> This Commission's charter from Congress, reflecting 200 years of legislative and executive actions, aptly describes the relationship between the United States and American Indian tribes as "unique" and "special." Such words have repeatedly been emphasized by the United States Supreme Court in opinions stretching across almost 1 1/2 centuries. Thus the unequivocal message from all three branches of our Federal Government is that Indian laws and policy is a field into itself.
>
> It is almost always a mistake to seek answers to Indian legal issues by making analogies to seemingly similar fields. General notions of civil rights law and public land law, for example, simply fail to resolve many questions relating to American Indian tribes and individuals. The extraordinary body of law and policy holds its own answers, which are often wholly

> unexpected to those unfamiliar with it.

Final Report, supra, at 99 (footnotes omitted).

Congress has plenary power over the Indian tribes, not under the treaty making power or the extradition clause, but under the Indian commerce clause. U.S. Const. art. 1, § 8, cl. 3. Congress had endorsed a policy of terminating all reservations and integrating individual Indians into the general population. But, by 1957, Congress repudiated its termination policy in favor of strengthening tribal government.

In 1959, the Supreme Court rejected territoriality [10] as a basis for Indian

10/ Territoriality was the basis for Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). Territoriality is the strongest type of sovereignty, but the Supreme Court has since declared that the reservation cannot be reinstated as a (Footnote continued on next page).

law and invented to replace it the so-called "infringement test." The still-applicable rule was formulated as follows: "Absent governing acts of Congress, the question [of jurisdiction] has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270-271, 3 L.Ed.2d 251 (1959).

Although the first phrase of the infringement test raised the possibility of federal preemption, early cases under Williams v. Lee concentrated on the infringement test, which was a sort of subject matter jurisdiction. That is, the court looked to the activity involved and made a case-by-case determination of its

(Footnote 10 continued) territorial sovereign. De Coteau v. District Court, 420 U.S. 425, 444-46, 95 S.Ct. 1082, 1092-1094, 43 L.Ed.2d 300 (1975).

effect on tribal government. E.g., Organized Village of Kake v. Egan, 369 U.S. 60, 75-76, 82 S.Ct. 562, 570-71, 7 L.Ed.2d 573 (1962). The infringement test created a presumption against state power. [11]

> It is instructive to place the immunity of Indian tribes from State jurisdiction in historical perspective. Since Williams v. Lee was handed down in 1958 [sic] ... the Court has never upheld any asserted State jurisdiction over Indians in Indian Country. Indeed, in its long history, the Supreme Court has never, absent express congressional authority, permitted any State to assume any jurisdiction whatsoever over Indians in Indian Country.

Final Report, supra, at 119.

11/ For a criticism of the Supreme Court's handling of Indian affairs, see Barsh. The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government, 5 Am. Indian L.Rev. 1 (1977). Barsh charges that the Supreme Court has involuted the infringement test, allowing the state to extend its jurisdiction to the reservation and even to take away rights expressly granted to the tribe by the federal government so long as there was no "infringement." But see text discussion of preemption analysis. Infra, pp. 532-533.

Pursuant to § 476 [12] of the Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1934), most tribes adopted constitutions, which were then ratified by the Secretary

12/ § 476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, (Footnote continued on next page).

of the Interior. See U.S. Dept. of Interior, Federal Indian Law 409 n.29 (Oceana Reprint 1906). The tribes thus entered into a new era of self-government with only the federal government as a superior power. Therefore, the infringement test applied to increasingly fewer cases. "The question [of inherent tribal sovereignty as a bar to state jurisdiction] is generally of little more than theoretical importance, however, since in almost all cases, federal treaties and statutes define the boundaries of federal and state

(Footnote 12 continued) the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates of Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

jurisdiction." McClanahan v. Arizona State Tax Comm'n, supra, 411 U.S. at 172 n.8, 93 S.Ct. at 1262 n.8, rev'g 14 Ariz. App. 452, 484 P.2d 221 (1971). The federal preemption part of the Williams v. Lee rule had come to overshadow the infringement test.

In Indian affairs, there are two separate chains of authority. Final Report, supra, at 119. One chain consists of the federal and tribal governments. The other chain consists of state, county and local governments. The relationship of the state and the tribe is a question of fact in each case. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); McClanahan v. Arizona State Tax Comm'n, supra, 411 U.S. 164, 93 S.Ct. 1257,36 L.Ed.2d 129. Although federal law, not state law, is preeminent in Indian country, the tribes

are not federal instrumentalities for substantive law purposes. Moe v. Confederated Salish & Kootenai Tribes, supra, 425 U.S. at 471, 96 S.Ct. at 1640; Mescalero Apache Tribe v. Jones, supra, 411 U.S. at 154, 93 S.Ct. at 1273. If they were, their activities would be limited to federal objectives. Treaties between the federal government and tribes are not, however, grants of power by the United States to the tribes, but rather grants of power from the tribes to the United States. Final Report, supra, at 95. The tribes retain all powers not specifically limited. Therefore, not only can the United States delegate some of its authority to regulate the affairs of Indians to tribes, but also the tribes retain inherent sovereignty over matters that affect the internal and social relations of tribal life. United States v. Mazurie, supra, 419 U.S.

44, 95 S.Ct. 710, 42 L.Ed.2d 706; Final Report, supra, at 119.

In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Supreme Court reaffirmed the principles of Williams v. Lee and McClanahan. Although the justices reached different conclusions on imposition of a state tax on cigarette sales on the reservation, all four opinions in Confederated Tribes recognized federal preemption. In the majority opinion, Justice White stated: "[T]ribal sovereignty is dependent on and subordinate to only the Federal Government, not the States." Id. 100 S.Ct. at 2081. Justice Brennan, dissenting in part, stated: "The prevalent mode of analysis is one of preemption. It takes as its starting point the exclusive power of the Federal Government to reg-

ulate Indian tribes and proceeds to bound state power where necessary to give vitality to the federal concerns at stake." Id. 100 S.Ct. at 2088. Justice Stewart, dissenting in part, reached his conclusion on the basis of effectuating federal policies. Id. 100 S.Ct. at 2092-93.

And, most significantly, Justice Rehnquist, who had written Mazurie and Moe, concurring and dissenting, wrote:

> Since early in the last century, this Court has been struggling to develop a coherent doctrine by which to measure with some predictability the scope of Indian immunity from state taxation. In recent years, it appeared that such a doctrine was well on its way to being established. I write separately to underscore what I think the contours of that doctrine are because I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years. That doctrine, I had thought, was at bottom a preemption analysis based on the principle that Indian immunities are

> dependent upon congressional intent, at least absent discriminatory state action prohibited by the Indian Commerce Clause. I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. Absent discrimination, the question is only one of congressional intent. Either Congress intended to preempt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.

Id. 100 S.Ct. at 2093 (footnote and citations omitted). Justice Rehnquist then proceeded to discuss the role of tribal sovereignty in federal preemption. The result was a two-step analysis. First, the Court reviews the "tradition of sovereignty" regarding the activity in question. Id. 100 S.Ct. at 2094. Second, the Court undertakes "a review of the relevant treaties and statutes to determine whether this tradition of immunity had been altered by Congress." Id. (foot-

note omitted). If there is a tradition of sovereignty, the Court will not infer a departure from that unless Congress has expressly abolished that sovereign power. Id., citing Bryan v. Itasca County, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112-2113, 48 L.Ed.2d 710 (1976). Conversely, if there is no tradition of sovereignty, the Court will not recognize a sovereign power unless Congress has expressly conferred one. Id., citing Mescalero Apache Tribe v. Jones, supra, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114.

Applying those principles, then, our task should not be to analogize from extradition law in a vain attempt to make the federal-tribe-state relationship fit that mold. [13] Nor should we balance

13/ Courts have sometimes reached the desired result by claiming that the Indian tribes were being "treated as domestic, dependent nations with whom the [United (Footnote continued on next page).

the state's interest against the tribe's interest. Rather we should apply Justice Rehnquist's two-step analysis to determine whether there is a tradition of tribal sovereignty which, unless expressly abolished by Congress, is retained by the tribe. This analysis is appropriate to an extradition problem, because an extradi-

(Footnote 13 continued) States] could make treaties as with a foreign nation." Ex parte Morgan, 20 F.298, 306 (W.D. Ark. 1883). There, an arrest warrant that the Arkansas governor issued to honor an extradition demand of the Cherokee chief was held void because neither was the chief a federal official who could act under the extradition treaty nor was Indian country a state or a territory for rendition purposes. Other courts have attempted to apply a federal-state analogy. E.g., Colliflower v. Garland, 342 F.2d 369, 376-79 (9th Cir. 1965) (tribal court is not of state or separate sovereign but is a federal agency), overruled in United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (tribal court is not a federal agency but has concurrent jurisdiction, like a state court). See Robertson, supra note 13, 6 Am.Indian L.Rev. at 392-93 arguing that state sovereignty doctrine should be applied to tribes. Neither analogy is trenchant in tribal
(Footnote continued on next page).

tion treaty creates rights only as to the sovereigns and only one sovereign's objection can affect the other sovereign's jurisdiction over a fugitive. Here, the tribe as a sovereign objects to the state court's jurisdiction over Davis.

Initially, I would look at the "tradition of sovereignty" regarding tribal courts. [14] The Eighth Circuit has long held that tribal courts are not federal creations or delegations of federal power, but rather are products of inherent tribal sovereignty. United States v. Elk,

(Footnote 13 continued) extradition cases for the simple reason that no foreign nation is located within any state of the United States or is subject to complete defeasance at the whim of the United States.

14/ Tribal sovereignty doctrine has been criticized as "so vague that any specific powers of self-government which remain vested in the tribes cannot be objectively determined in advance of a pronouncement by the Court." Robertson, supra note 13, 6 Am.Indian L.Rev. at 373.

561 F.2d 133, 135 (8th Cir. 1977); United States v. Walking Crow, 560 F.2d 386, 388 (8th Cir. 1977), cert. denied, 435 U.S. 953, 98 S.Ct. 1581, 55 L.Ed.2d 803 (1978); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956). This conclusion was also reached in other circuits, e.g., Tom v. Sutton, 533 F.2d 1101, 1103 (9th Cir. 1976), and has been confirmed by the Supreme Court United States v. Wheeler, 435 U.S. 313, 328 n.28, 98 S.Ct. 1079, 1089 n.28, 55 L.Ed.2d 303 (1978). Tribal courts have full jurisdiction over Indians on the reservation to the extent that such jurisdiction is not inconsistent with federal enactments. [15] Quechan Tribe of Indians v.

15/ The Major Crimes Act, 18 U.S.C. § 1153, preempts both state and tribal jurisdiction over enumerated crimes when committed by Indians in Indian country. United States v. John, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

Rowe, 531 F.2d 408, 411 n.4 (9th Cir. 1976). Therefore, Indian tribes, including the Turtle Mountain Band, retain inherent sovereign power to establish court systems with jurisdiction over tribal members. [16] Compare Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09, 98 S.Ct. 1011, 1020-1021, 55 L.Ed.2d 209 (1978) (no tradition of criminal jurisdiction over non-Indians).

Next I would look to see whether the tradition of sovereignty regarding Indian courts has been altered by Congress. Clearly, Congress has not abolished the Indian tribes' sovereign power to establish court systems. On the contrary, federal

16/ Nor is this power "inconsistent with their status" as limited sovereigns subordinate to the United States. Our federal form of government provides numerous examples of limited sovereigns exercising concurrent jurisdiction over the same territory and people. Note, Indian Rights-What's Left?, 41 U.Pitt.L.Rev. 75, 84 (1979).

statutes and rules promulgated thereunder support the authority of the tribal courts. [17] Section 476 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., recognized all existing rights of Indian tribes and also encouraged tribes to adopt constitutions and bylaws, which would then be approved by federal authorities. One tribal power recognized by courts is the authority of tribal courts to transfer those who violate state or federal laws to state or federal officials. See Quechan Tribe of Indians v. Rowe, supra, 531 F.2d at 411 (hunting violation by non-Indians). Where the state and the tribe might otherwise have concurrent jurisdiction, the state's

17/ This is not a case of delegation, although if it were I would reach the same result because Congress would have expressly conferred the power.

jurisdiction is totally preempted by federal policy and legislation, and the state cannot exercise jurisdiction unless Congress expressly grants it. See Fisher v. District Court, supra, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (adoption proceedings); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1976), cert. denied, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977) (land use ordinances), citing Indian Reorganization Act, 25 U.S.C. § 461 et seq., and Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq.

The Turtle Mountain Band adopted a Constitution and Bylaws in 1959, which were approved by the Commissioner of the Interior and the Assistant Secretary of the Interior. Pursuant to the authority vested in it by article IX of that Constitution, the Tribal Council enacted

the Turtle Mountain Tribal Code of 1976 of which § 1.0710-.0713 governs arrest and extradition of reservation Indians to state authorities. There is no applicable federal statute conferring jurisdiction over these matters on the state.

In summary, the Turtle Mountain Band has a tradition of sovereignty which includes the power to establish a court system with full jurisdiction over its members, except where abrogated by Congress. One function of the tribe's court system is its control of the arrest and extradition of tribal members. This function has not been abrogated by Congress. On the contrary, this function is consistent with Congressional intent as shown in federal statutes implementing tribal self-government. Under these circumstances, there is a presumption against state jurisdiction, which

could have been overcome only by a federal enactment explicitly granting jurisdiction to the state. There is no such enactment here. State jurisdiction over Indian offenders on the reservation is preempted by the legislation and policy of the federal government, with its exclusive power to regulate Indian affairs.

The Ker-Frisbie doctrine that a court maintains personal jurisdiction over a defendant despite any illegality in the arrest is based on the rationale that a fugitive has no right of asylum. The Ker-Frisbie doctrine is, however, inapplicable to a state's violation of the tribal extradition ordinance. The state cannot exercise jurisdiction over the Indian fugitive, not because of a violation of the Indian fugitive's individual rights, but because of Congressional intent that the state recognize tribal sovereignty

by complying with the tribal extradition ordinance. Where Congress has expressed its intention regarding the affairs of Indians, over which it has plenary authority, it is not for the courts to attempt to balance state interests against tribal interests. There is a federal policy of encouraging Indian self-government. State violation of tribal extradition ordinances impedes tribal self-government. Therefore, in my opinion, the state court should not be allowed to maintain jurisdiction over Davis until the Rolette County officials comply with the Turtle Mountain tribal extradition ordinance.

Thomas D. DAVIS, Petitioner,

v.

Bryant MUELLAR, as Sheriff of Rolette County, North Dakota, Respondent.

Civ. No. A2-79-218.

United States District Court,
D. North Dakota,
Northeastern Division.

Dec. 27, 1979.

ORDER

BENSON, Chief Judge

In the above entitled action, Thomas D. Davis, the petitioner, an enrolled member of the Turtle Mountain Band of Chippewa Indians, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, to compel his release from custody. The petition alleges that Davis was arrested by Rollette County officials on October 10, 1978, within the external boundaries of the Turtle Mountain Indian Reservation. He was charged with terror-

izing under N.D.Cent.Code § 12.1-17-04, for making a threatening phone call to one Kim Albert in Rolla, an off reservation town. Davis was arrested without a warrant and placed in custody by the county officials at the Tribal Law and Order Office on the reservation. He was not given an extradition hearing before or after being taken into custody. A tribal ordinance allegedly would have required one in such circumstances. After he was placed in custody, a complaint was filed, a warrant was issued, and bond was set at $1,500.00. It was still October 10 when Davis' wife posted the bond at the sheriff's office in Rolla, and petitioner was released. The terms of his bond required him to appear in county court and district court as required.

Davis alleges that being placed in

custody by county officials without an extradition hearing, even though he requested one, was an arrest contrary to the laws of the United States. This argument is premised on a tribal ordinance which has been approved by the Bureau of Indian Affairs, and which provides for certain procedures to be followed in arresting a tribal member for a crime committed off the reservation, one of which is an extradition hearing. In effect, he argues that the county officials were without jurisdiction to arrest him.

At his preliminary hearing in county justice court, Davis moved for a dismissal, claiming that his arrest violated his rights when the county officials failed to comply with the reservation extradition ordinance. This motion was denied and Davis was bound over to the district court.

Davis then petitioned the district court for a writ of habeas corpus on the same grounds asserted in county court. This was denied by the district court on its reasoning that one released on bond awaiting trial, where there has been no state judgment of conviction, is not "in custody." The court did note that Davis could raise the jurisdiction issues before the trial court. After his writ was denied, Davis moved the district court at the time of his arraignment for a dismissal of the charge. This was also denied on the ground that the validity of an arrest does not affect the validity of continued prosecution.

Davis then sought a writ of prohibition from the Supreme Court of North Dakota, to restrain the district court from prosecuting him. Without reaching the merits of Davis' petition, the court

denied the writ. Davis v. O'Keefe, 283 N.W.2d 73, 76 (N.D. 1979). The court noted that a writ of prohibition is used sparingly and only where there is an inadequate remedy by appeal, or where there is some other equitable justification. The court held that Davis would not be irreparably injured in defending himself against a criminal charge. Id. at 76.

Davis now petitions this court for a writ of habeas corpus. As of this date, he is still released on bond, and he has not yet been tried. The remedy he seeks is absolute release from custody which would prevent the state district court from conducting his criminal trial, now scheduled for early January, 1980.

Before ruling on the petition, a preliminary matter must be diposed of. Davis has moved the court to accept his

petition for consideration, although it is not on a form supplied by the Clerk of Court as is required by our Local Rule X(C)(9). The court has reviewed the petition and finds that it is in substantial conformity with the form required. Since it is a Local Rule requirement that petitions be on a standardized form, and not a requirement of the habeas corpus statute or the rules pertaining thereto adopted by the United States Supreme Court, this court is free to waive the requirement. In light of the completeness of the petition filed in this case, petitioner's motion for leave to file a petition not in conformance with Local Rule X(C)(9) is granted.

The habeas corpus statute requires that an applicant have exhausted his state remedies before relief may be

granted. 28 U.S.C. § 2254(b). [1] Davis alleges that he has exhausted his state remedies in that he has brought four state pre-trial actions including one to the state supreme court, in an effort to restrain the county from going on with the prosecution. However, he has not yet been tried so that there has been no judgment of conviction by a state court.

The Supreme Court has held that "federal habeas corpus does not lie, absent 'special circumstances,' to

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1/ The court will assume that Davis is "in custody" while out on bond awaiting trial. In Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1972), the Court held that one released on his own recognizance after his conviction and pending sentence is in custody for the purposes of habeas corpus relief. And in Scranton v. State of N.Y., 532 F.2d 292, 294 (2nd Cir. 1976), the court saw no distinction between pre-conviction and post-conviction release on bail in determining whether one was "in custody." But as the Court in Hensley noted, the distinction lies in that one who is released on bail pending

(Footnote continued on next page).

adjudicate the merits of an affirmative defense to a state criminal charge prior to a judgment of conviction by a state court." Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 489, 93 S.Ct. 1123, 1127, 35 L.Ed.2d 443 (1973); Ex parte Royall, 117 U.S. 241, 251, 6 S.Ct. 734, 29 L.Ed. 868 (1886). This requirement stems from the exhaustion requirement, in that unless the petitioner has been tried, he has not presented these issues to the state trial court and he has not availed himself of the right to appeal to the highest state court from an adverse lower court judgment. Even though the court has jurisdiction to grant writs of habeas corpus to petitioners in state custody who have not yet been tried,

(footnote 1 continued) trial must still comply with the exhaustion requirement. 411 U.S. at 353, 93 S.Ct. 1571.

in the interest of comity between the state and federal court, this court will not assert jurisdiction in such a case, absent special circumstances. See, e.g., Paris v. Elrod, 589 F.2d 327, 328-29 (7th Cir. 1979). See also Ex parte Royall, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886) where the Supreme Court at 251, 6 S.Ct. at 740 said:

> [The granting of habeas corpus relief in the absence of a state court judgment] should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

In Braden, supra, special circumstances were found in that petitioner was alleging that his speedy trial rights were denied in not being brought to trial. It was proper to act in that case because

the very wrong complained of was the fact of not being brought to trial. In the case now before this court the petitioner is seeking to avoid state trial. Courts have also granted habeas corpus relief prior to a state court judgment when the defense asserted is double jeopardy. See e.g., Russo v. Superior Court of N.J., Etc., 483 F.2d 7, 12 (3rd Cir. 1973), cert. denied, 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973). Habeas corpus is proper in such a case because the purpose of double jeopardy protection is to prevent citizens from being subjected to the ordeal of another trial. Id. If petitioner was forced to be subjected to another trial with only the opportunity for appeal, the double jeopardy protections would be thwarted.

Davis is seeking protection from the alleged denial of his right to be arrested

pursuant to tribal procedures. He argues that the unique stature given tribal sovereignty constitutes special circumstances. Tribal sovereignty and state-tribal relations are important considerations but such considerations do not rise to the standard of special circumstances contemplated in Braden and Russo.

Davis has exhausted his pretrial state remedies but the exhaustion of pretrial remedies is not sufficient for federal habeas corpus relief. See Scranton v. State of N.Y., 532 F.2d 292, 295 (2nd Cir. 1976). The opportunity for Davis to assert his alleged rights will not be lost if the matter goes to state court judgment. In its decision denying the writ of prohibition, the state supreme court held that it did not resolve the issue of the lawfulness of the arrest. Davis v. O'Keefe, 283

N.W.2d 73, 76 (N.D. 1979). Davis would have the right to appeal from an adverse trial court judgment and the state supreme court would have a fair opportunity to consider the merits of his claim.

A more compelling reason also exists for the denial of the relief Davis requests. In Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court held that a federal court cannot interfere with a pending state criminal prosecution either by injunction or declaratory judgment, absent a showing of extraordinary circumstances indicating a threat of great and immediate irreparable injury.

> [T]he cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense

> against a single criminal prosecution.

Id. at 46,[2] 91 S.Ct. at 751.

There is little difference between granting federal habeas corpus relief from a pending state criminal trial and enjoining the same trial. The principles of federalism and comity underlying Younger are present in both. See e.g. Kolski v. Watkins, 544 F.2d 762, 766 (5th Cir. 1977); Scranton v. State of N.Y., 532 F.2d 292, 295 (2nd Cir. 1976); Tyler v. Hall, 444 F.Supp. 104, 106 (E.D. Mo. 1978).

This court will not interfere with the state judicial process and the pend-

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2/ The court intimated that a showing of bad faith or harassment by state officials may constitute "special circumstances." Id. at 54, 91 S.Ct. 746. There has been no such showing in the instant case.

ing criminal prosecution.[3]

IT IS ORDERED that petitioner's request for federal habeas corpus relief is denied.

3/ Davis had moved to have the court order the respondent to show cause why habeas corpus relief should not be granted. Pursuant to 28 U.S.C. § 2243, such an order is not necessary where, as here, it appears from the application that petitioner is not entitled to relief.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1082		September Term, 1980
Thomas D. Davis,	)	
	)	
Appellant,	)	Appeal from the
	)	United States
vs.	)	District Court
	)	for the District
Bryant Muellar, as Sherriff of Rolette County, North Dakota,	)	of North Dakota.
	)	
	)	
	)	
Appellee.	)	
	)	
	)	

The Court, having considered appellee's* petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

April 3, 1981

* Sic. [Petition was filed by appellant.]